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Supreme Court, U.S.
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No. 93-1875

In the Supreme Court of the United States

OCTOBER TERM, 1994

R.H. RISON, ET AL., PETITIONERS

v.

JOHN DEMJANJUK, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

SUPPLEMENTAL BRIEF FOR THE PETITIONERS

DREW S. DAYS, III
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Department of Justice
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BEST AVAILABLE COPY

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Our petition for a writ of certiorari seeks review of the court of appeals' ruling that government attorneys who acted in good faith and without a subjective intent to defraud during litigation against respondent nevertheless committed fraud upon the court by failing to disclose during respondent's denaturalization and extradition proceedings information that they did not consider exculpatory. We submit this supplemental brief to address an intervening matter that has recently arisen.

1. The Office of the Solicitor General follows a practice of providing copies of all Supreme Court briefs and petitions prepared within the Office to all attorneys within the Office. Kent L. Jones, the Tax Assistant to the Solicitor General, accordingly received a copy of the government's certiorari petition in this case. Mr. Jones

informed the government attorneys responsible for preparing the petition that upon reading the petition and appendix, he recalled a conversation with Allan A. Ryan, Jr., in early 1980. Mr. Ryan was an Assistant to the Solicitor General until early 1980, when he became Deputy Director of the Office of Special Investigations (OSI). See Pet. App. 100a. Mr. Jones also served as an Assistant to the Solicitor General at that time, until March 15, 1980, when he left that position for private practice. According to Mr. Jones, the conversation occurred after Mr. Ryan left the Solicitor General's Office in early 1980 and before Mr. Jones left the Office on March 15, 1980.

Mr. Jones recalled that during this casual conversation with Mr. Ryan, Mr. Ryan mentioned a pending OSI investigation in which the government knew that an individual had been a Nazi camp guard. Mr. Jones recalled Mr. Ryan's stating that the government had some information that might be conflicting as to the camp at which the individual had served. According to Mr. Jones, Mr. Ryan said that it did not make a difference at which camp the individual had served, because in either event he was in the United States illegally. Mr. Jones remembered suggesting to Mr. Ryan that the conflicting information would come out during the proceeding against the individual. According to Mr. Jones, Mr. Ryan replied that the government did not have a duty to disclose the information. Mr. Jones then asked Mr. Ryan whether this Court's decision in *Brady* v. *Maryland*, 373 U.S. 83 (1963), applied, and Mr. Ryan said he did not think so. According to Mr. Jones, Mr. Ryan did not mention the name of the person under investigation.

2. After learning this information, government counsel sent a letter to counsel for respondent John

Demjanjuk, recounting Mr. Jones's recollection. See Addendum, *infra*, 1a-3a. The government also sent a copy of that letter, dated August 22, 1994, to the special master in the proceeding below and to counsel for other individuals involved in that proceeding, including counsel for Mr. Ryan. On August 26, 1994, Mr. Ryan wrote to respondent's counsel that he did not recall the conversation with Mr. Jones and that he could state with confidence that he never said or meant to imply that OSI intended to withhold material information because *Brady* v. *Maryland*, *supra*, did not compel its disclosure. See Addendum, *infra*, 4a-5a.

On August 30, 1994, respondent's counsel wrote to the Solicitor General about the matter. See Addendum, *infra*, 6a-8a. Respondent's counsel stated, among other things, that our disclosure of Mr. Jones's recollection put into issue whether the government attorneys in the denaturalization and extradition proceedings acted in good faith and without subjective intent to defraud, "thereby altering the question the Court would have to decide if certiorari were granted." *Id.* at 6a. Respondent's counsel stated their belief that "the Solicitor General should withdraw the petition for a writ of certiorari or should inform the Supreme Court that there are serious questions that suggest that the Court may wish to deny certiorari or to remand the case; and should inform the Sixth Circuit that this new credibility issue exists and might call for renewed adversary inquiry. Compare Communist Party v. SACB, 351 U.S. 115 (1956)." *Id.* at 8a. We have prepared this supplemental brief to apprise the Court of the matter and its relationship to our petition.

3. We provided respondent's counsel with the recollection that Mr. Jones reported to us to ensure that they have access to information that they may deem relevant

in their representation of Mr. Demjanjuk and that they might not otherwise discover. We disagree, however, with respondent's suggestion that Mr. Jones's recollection alters the question presented in our certiorari petition in this Court or otherwise diminishes the need for this Court's review. We have petitioned for a writ of certiorari in this case because the court of appeals' ruling on a question of law—specifically, the appropriate standard for evaluating an allegation of fraud on the court—is inconsistent with the decisions of other courts of appeals and the language of Rule 60(b) of the Federal Rules of Civil Procedure. Mr. Jones's report of his recollection does not alter the court of appeals' legal ruling, eliminate the conflict, or reduce the need for a consistent legal standard for resolving allegations of fraud on the court.

Respondent has suggested that Mr. Jones's recollection alters the question presented for review because that question "presumes the OSI attorneys in question acted in 'good faith,' lacked 'subjective intent to defraud', and possessed only 'information that they did not consider exculpatory.'" Addendum, *infra*, 6a. Our question presented, however, did not merely "presume" those facts, but relied on the special master's factual determinations, which the court of appeals accepted in all relevant respects. See Pet. 6-11, 12-13. As this Court has made clear, the question presented in a petition for a writ of certiorari is determined by the decision and the record below. See *FTC* v. *Sun Oil Co.*, 371 U.S. 505, 512 & n.7 (1963); *Davis* v. *Packard*, 32 U.S. (7 Pet.) 276, 281-282 (1833). Under longstanding practice, this Court's review on the merits is similarly restricted to that record. See, *e.g.*, *Thornton* v. *Carson*, 11 U.S. (7 Cranch) 596, 601 (1813). An extra-record report of an individual's recollection—even if it bears on the case—cannot by

itself disturb the validity of a judgment or displace the record upon which the judgment rests. By the same token, it cannot provide a basis for denial of the petition for a writ of certiorari in a case that otherwise satisfies this Court's standards for review.

Contrary to respondent's suggestion, our disclosure of Mr. Jones's recollection also provides no basis for remanding the case at this juncture "for renewed adversary inquiry." Addendum, *infra*, 8a. Mr. Jones's recollection does not provide an alternative ground for affirming the court of appeals' judgment or a ground for setting it aside. It will become relevant to these proceedings—to the extent it has any relevance at all—only if this Court reverses the judgment on the basis that we have urged and remands the case for further action under the appropriate legal standard. We do not believe that Mr. Jones's recounting of his recollection would provide a basis for disturbing the special master's factual findings. But should respondent disagree, he can request the court of appeals to examine on remand whether the matter warrants a reopening of the factual record.*

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* This Court's decision in *Communist Party* v. *Subversive Activities Control Board*, 351 U.S. 115 (1956), which respondent's counsel cited in their correspondence, Addendum, *infra*, 8a, is inapposite. In that case, the petitioner was ordered to register with the Attorney General as a "Communist-action" organization. 351 U.S. at 116. The petitioner appealed that order, and while the appeal was pending it filed a motion to adduce additional evidence, alleging that it had recently learned that the Subversive Activities Control Board, which had issued the order, had relied on perjurious testimony. The court of appeals denied the motion and affirmed the order. In this Court, the petitioner challenged both the denial of its motion and the constitutionality of the registration requirement. *Id.* at 122. The Court granted the petition and

In sum, this Court should review this case because the court of appeals' decision creates conflicting legal standards among the circuits on an important question of federal law. The recollection of a single individual with no direct involvement in the underlying dispute does nothing to dispel that conflict or diminish the importance of the issue. For the reasons stated in our petition and our reply brief, it is respectfully submitted that the petition for a writ of certiorari should be granted.

DREW S. DAYS, III
Solicitor General

SEPTEMBER 1994

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reversed on the ground that the court should have allowed consideration of the new evidence, which amounted to an "uncontested challenge of perjury." See *id.* at 122-125. Here, by contrast, no question concerning Mr. Jones's recollection was raised or decided below, and that recollection—which does not amount to an "uncontested challenge of perjury"—does not provide a basis for reversing the judgment.

ADDENDUM A

U. S. Department of Justice

Washington, D.C. 20530

August 22, 1994

Michael G. Dane
Office of the Federal Public Defender
Northern District of Ohio
Skylight Office Tower—Suite 750
1680 West Second Street
Cleveland, OH 44113-1454

Michael E. Tigar
School of Law
University of Texas at Austin
727 East 26th Street
Austin, Texas 78705

Re: *Demjanjuk v. Petrovsky*, No. 85-3435

Dear Messrs. Dane and Tigar:

We are writing to advise you of information that recently came to our attention.

Kent L. Jones currently is the Tax Assistant to the Solicitor General. Mr. Jones also served as an Assistant to the Solicitor General for a period that ended on March 15, 1980. Mr. Jones has informed us that upon reading the government's petition for certiorari in this case, he recalled a conversation

with Allan Ryan during his prior service in the Solicitor General's office. According to Mr. Jones, this conversation occurred after Mr. Ryan left the Solicitor General's office in early 1980 and before Mr. Jones left the office on March 15, 1980.

Mr. Jones recalled that during a casual conversation with Mr. Ryan, Mr. Ryan mentioned a pending OSI investigation in which the government knew that an individual had been a Nazi camp guard. Mr. Jones recalled that Mr. Ryan stated, however, that the government had some information that might be conflicting as to the camp at which the individual had served. According to Mr. Jones, Mr. Ryan stated that it did not make a difference at which camp the individual had served, because in either event he was in the United States illegally. Mr. Jones recalled that he suggested to Mr. Ryan that the conflicting information would come out during the proceeding against the individual. According to Mr. Jones, Mr. Ryan replied that the government did not have a duty to disclose the information. Mr. Jones then asked Mr. Ryan whether *Brady* applied, and Mr. Ryan said that he did not think so. According to Mr. Jones, Mr. Ryan did not mention the name of the person under investigation.

Very truly yours,

/s/Patty Merkamp Stemler
PATTY MERKAMP STEMLER
Chief

/s/Joseph Douglas Wilson
JOSEPH DOUGLAS WILSON
Attorney

Appellate Section
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(202) 514-2611

cc: Hon. Thomas A. Wiseman, Jr.
Richard D. Glovsky
Charles P. Goodell
Gerald J. Houlihan
Irvin B. Nathan

ADDENDUM B

ALLAN A. RYAN, JR.

Suite 980
1350 Massachusetts Avenue (617) 495-0525
Cambridge, Massachusetts 02138 Fax (617) 495-5079

August 26, 1994

Michael Tigar, Esq.
School of Law
University of Texas at Austin
727 East 26th Street
Austin, Texas 78705

Dear Michael:

I have received a copy of Ms. Stemler's letter of August 22, 1994 to you and Mr. Dane, concerning Kent L. Jones.

Mr. Jones was not on the staff of the Office of Special Investigations, and I do not recall speaking to him at any time, in a "casual conversation" or otherwise, about any "pending OSI investigation", or indeed about any OSI matter. If he means to suggest—as I gather from Ms. Stemler's letter that he does—that I stated or implied to him that OSI intended to withhold material information because *Brady* v. *Maryland* did not compel its disclosure, then I can say with confidence that I never said, nor meant to imply, such a thing to anyone.

I testified in detail before Judge Wiseman on my views on government disclosure in denaturalization cases independent of what *Brady* might require. I stand by that testimony.

Sincerely,

/s/ Allan A. Ryan, Jr.
Allan A. Ryan, Jr.

cc:
Hon. Thomas Wiseman
Michael G. Dane, Esq.
Gerald Houlihan, Esq.
Irving Nathan, Esq.
Charles Goodell, Esq.
Patty Stemler, Esq.

ADDENDUM C

MICHAEL E. TIGAR
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THE UNIVERSITY OF TEXAS SCHOOL OF LAW

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(512) 471-6319 . FAX (512) 478-3202

August 30, 1994

Hon. Drew S. Days, III
Solicitor General of the United States
Department of Justice
Washington, D.C. 20530

Re: Rison v. Demjanjuk, Supreme Court No. 93-1875

Dear General Days:

The United States has filed a petition for certiorari in the above-captioned case. In the Question Presented, you use language that presumes the OSI attorneys in question acted in "good faith," lacked "subjective intent to defraud", and possessed only "information that they did not consider exculpatory." The August 22, 1994 letter from Patty Stemler and Joseph Douglas Wilson (copy attached) puts those presumptions at issue, thereby altering the question the Court would have to decide if certiorari were granted.

We believe that the revelations that are the subject of the government's letter of August 22, 1994, and the consequences that may flow from them, should be brought to the Supreme Court's attention. This

should be done in order to avoid the possibility that certiorari would be granted only to later learn that the question as framed by the government cannot be decided due to the lack of a full record in the courts below. We further believe that this matter should be brought to the Court's attention by the petitioning party.

In considering the reasonable inferences that can be drawn from the information in the government's August 22, 1994 letter, we note that the government has chosen, most appropriately, to send this information to us, with a copy to the Special Master, and chose to do so under the Sixth Circuit Demjanjuk case caption. Mr. Jones's conversation with Mr. Ryan would support inferences contrary to the assertions in the Supreme Court question presented, and would—in our view—have been material and relevant in the Special Master's and the Court of Appeals' assessment of Mr. Ryan's credibility. It would also appear to have direct relevance to the government's lawyers' attitudes toward disclosure of material evidence during the crucial periods in early 1980 and in 1981 when Mr. Ryan was director of OSI and immediately prior to and during the Demjanjuk denaturalization litigation. (We remind you that an allegation of Demjanjuk's presence at Treblinka carried the prospect of extradition to Israel on a capital charge, while allegations of actions at other camps would not.) We view the significance of Mr. Jones's statements in light of the close credibility questions that dominated the proceedings before the Special Master and in the Sixth Circuit, as reflected both in the Master's Report and the Court of Appeals' Opinion. Mr. Ryan's flat contradiction of Mr. Jones (letter attached) only intensifies the legitimate concerns on these issues. (In the court of appeals opinion of which you seek review, Judge Lively says the court is "accepting as true that no OSI attorney

deliberately withheld from Demjanjuk or the court information that he believed he had a duty to disclose, even though the withholding itself was deliberate." 10 F.3d at 349.)

Under these circumstances, we believe the Solicitor General should withdraw the petition for certiorari or should inform the Supreme Court that there are serious questions that suggest that the Court may wish to deny certiorari or to remand the case; and should inform the Sixth Circuit that this new credibility issues exists and might call for renewed adversary inquiry. Compare Communist Party v. SACB, 351 U.S. 115 (1956).

In the meantime, we ask for all documents and other records currently in the government's possession or reasonably discoverable, related to the information provided to us in the government's letter of August 22, 1994. We are willing to meet on short notice, but request the favor of at least some response to this communication within forty-eight hours, given the imminence of the Court's Term opening. I can also be reached by telephone.

Sincerely,

/s/ Michael E. Tigar
Michael E. Tigar
Michael G. Dane
Edward F. Marek

cc: Patty Merkamp Stemler
Joseph Douglas Wilson

VIA FAX
HARD COPY BY MAIL